

UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

JOSEPH ANTHONY DIGERLAMO,	)	CASE NO. 2:19-cv-01976-BJR
	)	
<i>Petitioner,</i>	)	ORDER ADOPTING REPORT AND
	)	RECOMMENDATION AND
v.	)	DISMISSING FEDERAL HABEAS
	)	CORPUS PETITION WITH PREJUDICE
JEFFEREY A. UTTECHT,	)	
	)	
<i>Respondent.</i>	)	

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**I. INTRODUCTION**

Before the Court is Petitioner Joseph Anthony Digerolamo's <sup>1</sup> ("Petitioner") *pro se* and *in forma pauperis* Petition for Writ of Habeas Corpus. Dkt. No. 5. The Court is in receipt of the Report and Recommendation ("R&R") of the Honorable Mary Alice Theiler, United States Magistrate Judge, which advises the Court to deny Petitioner's federal habeas petition, dismiss the present action as untimely pursuant to 28 U.S.C § 2244(d), and deny a certificate of appealability

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<sup>1</sup> The record and Petitioner's filings consist of two different spellings of his last name. See Dkt. No. 15, Ex. 1 ("Digerlamo: a/k/a 'Di' Gerolamo") and Ex. 2 at 1, n.1 ("Digerolamo"); Dkt. No. 5 ("DiGerolamo). For consistency, the R&R retains in the caption, as does this Court, the spelling previously utilized in the docket, while otherwise adopting the spelling utilized by Petitioner and/or a state court.

1 (“COA”). Dkt. No. 20. The Court is also in receipt of Petitioner’s objections to the R&R. Dkt.  
2 No. 21.

3 Having reviewed the habeas petition, the R&R, Petitioner’s objection thereto, the relevant  
4 legal authority, and the record of the case, the Court will adopt the R&R, dismiss Petitioner’s  
5 habeas petition with prejudice, and deny a COA. The reasoning for the Court’s decision follows.

## 6 **II. BACKGROUND**

7 Petitioner is currently confined at the Coyote Ridge Corrections Center in Connell,  
8 Washington and filed the pending 28 U.S.C. § 2254 federal habeas corpus petition challenging his  
9 custody pursuant to a 2012 King County judgment and sentence entered after a unanimous jury  
10 found him guilty of rape in the second degree. Dkt. No. 15, Ex. 1. The R&R provides the factual  
11 and procedural background of the underlying case in more detail, further recitation of which is  
12 unnecessary here. *See* Dkt. No. 20 at 2–5. Petitioner contends his imprisonment by the State of  
13 Washington is unlawful and cites eleven separate grounds for relief, including alleged Fourth,  
14 Fifth, Sixth, and Eighth Amendment violations. Dkt. No. 5 at 6–11.

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16 On May 15, 2020, Magistrate Judge Theiler entered an R&R recommending dismissal of  
17 the Petition with prejudice finding it was untimely as submitted two years after the one-year statute  
18 of limitations under 28 U.S.C. § 2244(d) expired. Dkt. No. 20 at 17. Specifically, Petitioner filed  
19 a total of eight (8) personal restraint petitions<sup>2</sup> (“PRPs”) with the Washington State Courts between  
20 November 2014 and February 2019, Dkt. No. 15, Exs. 10, 14, 18, 22, 29, 35, 39, 47, the last of  
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24 <sup>2</sup> A “PRP” is the Washington State equivalent of a federal habeas corpus petition. *See* WASH. R. APP. P. 16.4. The  
25 Washington Supreme Court and the Court of Appeals have original, concurrent jurisdiction in personal restraint  
proceedings in which the death penalty has not been decreed. WASH. R. APP. P. 16.3(c).

1 which capable of tolling the one-year statute of limitations was finalized on January 20, 2017 when  
2 the Washington Court of Appeals filed its Certificate of Finality as to that claim. Dkt. No. 15, Ex.  
3 34. Magistrate Judge Theiler found three subsequent PRPs and two ancillary motions did not toll  
4 the statute of limitations because the PRPs themselves, *id.* Exs. 35-37, 39, 47, were untimely under  
5 state law and the motions, *id.* Exs. 45, 46, did not call for review of the underlying judgement and  
6 sentence. Dkt. No. 20 at 9–10. Additionally, Magistrate Judge Theiler found equitable tolling was  
7 not appropriate on procedural grounds or a showing of actual innocence. Dkt. No. 20 at 11 & 13.  
8 On May 29, 2020, Petitioner filed objections to the R&R. Dkt. No. 21.  
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### 10 **III. LEGAL STANDARD**

11 District courts review a magistrate judge’s findings within an R&R *de novo* when a party  
12 properly files specific, written objections. 28 U.S.C. § 636(b)(1); FED. R. CRIM. P. 59(b)(3); *United*  
13 *States v. Thoms*, 684 F.3d. 893, 899 (9th Cir. 2012). The Court may accept, reject, or modify the  
14 recommendation of the magistrate judge. FED. R. CRIM. P. 59(b)(3). A *pro se* filing is “to be  
15 liberally construed and, however unartfully pleaded, must be held to less stringent standards than  
16 formal pleadings drafted by lawyers.” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle*  
17 *v. Gamble*, 429 U.S. 97, 106 (1976)). With this liberal construction in mind, the Court reviews the  
18 portions of the R&R to which Petitioner objects *de novo*.  
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20 The Court must decide whether a habeas petition is time-barred under 28 U.S.C. §  
21 2244(d)(1) before reaching the merits of a petitioner’s claims. *Ford v. Gonzalez*, 683 F.3d 1230,  
22 1238 (9th Cir. 2012). 28 U.S.C. § 2244(d) requires, with a few exceptions not applicable here, a  
23 federal habeas petition to be filed within one year of the date on which the judgment became final  
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1 by the conclusion of direct review.<sup>3</sup> 28 U.S.C. § 2244(d)(1)(A). The one-year limitation period  
2 is tolled, however, during the pendency of “a properly filed application for State post-conviction  
3 or other collateral review with respect to the pertinent judgment or claim.” *Id.* at § 2254(d)(2);  
4 *Wall v. Kholi*, 562 U.S. 545, 545 (2011). Whether a state collateral proceeding is properly filed is  
5 a matter of state law. *Artuz v. Bennett*, 531 U.S. 4, 8 (2000). A petition deemed untimely under  
6 state law is not properly filed for the purposes of U.S.C. 28 § 2254(d). *Pace v. DiGuglielmo*, 544  
7 U.S. 408, 416-17 (2005).

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9 In addition to statutory tolling, the one-year statute of limitations under U.S.C. 28 § 2254(d)  
10 is subject to equitable tolling if the petitioner can show “(1) he has been pursuing his rights  
11 diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely  
12 filing.” *Holland v. Florida*, 530 U.S. 631, 649 (2010) (quoting *Pace*, 544 U.S. at 418). A showing  
13 of actual innocence may also satisfy the requirements for equitable tolling. *McQuiggin v. Perkins*,  
14 569 U.S. 383, 386 (2013). To make a credible claim of actual innocence, a petitioner must “support  
15 his allegations of constitutional error with new reliable evidence—whether it be exculpatory  
16 scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not  
17 presented at trial.” *Schlup v. Delo*, 513 U.S. 298, 324 (1995).

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23 <sup>3</sup> There is no basis to apply the other provisions of the one-year limitations period. Petitioner does not show he  
24 suffered any impediment to filing his federal petition. 28 U.S.C. § 2244(d)(1)(B). Neither does he contend any of  
25 his claims are based on a new constitutional right recognized by the United States Supreme court and made  
retroactively applicable to cases on collateral review. *Id.* at § 2244(d)(1)(C). Lastly, he has not shown that he filed  
his petition within one year of the date “the factual predicate of the claim or claims presented could have been  
discovered through the exercise of due diligence.” *Id.* at § 2244(d)(1)(D).

#### IV. DISCUSSION

Petitioner's opportunity to file a timely federal habeas petition expired on January 20, 2018, one year after receiving a Certificate of Finality on his last timely PRP. *See Phongmanivan v. Haynes*, 195 Wn.2d 309 (2020) (holding a Certificate of Finality under WASH. R. APP. P. 12.7 establishes the date of finality for a PRP or other state collateral proceeding).

The habeas petition and objection to the R&R fail to provide any explanation as to why Petitioner filed his habeas petition nearly two years after the federal statute of limitations expired, despite pursuing other state-court actions, such as the PRPs discussed *supra*, both during and after his federal habeas statute of limitations ran. *See e.g.*, Dkt. No. 15, Exs. 29, 34, 39, 47. Petitioner's objections do not respond to Magistrate Judge Theiler's conclusions of untimeliness, aside from generally alleging his habeas petition is not time barred and reiterating arguments from his previous briefings. Dkt. No. 21 at 7.

Petitioner also fails to demonstrate any extraordinary circumstances entitling him to equitable tolling but does allege he is entitled to equitable tolling under the *Schlup* actual innocence standard because the statutory definition of second-degree rape "has been misinterpreted and incorrectly applied by the state." Dkt. No. 21 at 2. He further contends this is "new evidence, not presented at trial" because the DNA evidence was found "on," rather than "in," the victim's body. Dkt. No. 21 at 6. As Magistrate Judge Theiler correctly found, however, Petitioner misinterprets the statute under which he was convicted. *See* Dkt. No. 20 at 17; WASH. REV. CODE ANN. § 9A.44.010(1). The DNA evidence found on the victim's body thus supports Petitioner's conviction of rape in the second degree. Petitioner does not provide "new reliable evidence . . . not introduced at trial" to support the legal argument he attempts to make, and instead relies on

1 evidence employed at trial. Dkt. No. 15, Ex. 43 at 1-2. Because Petitioner does not provide any  
2 new evidence and the evidence which he does present supports his conviction, he does not  
3 demonstrate a basis for equitable tolling under the *Schlup* actual innocence showing. *See Schlup*,  
4 513 U.S. at 324. The Court will thus adopt Magistrate Judge Theiler's R&R and dismiss  
5 Petitioner's habeas petition.

6 Having decided Petitioner's claim should be dismissed with prejudice, the Court must  
7 decide whether to issue a COA. A petitioner seeking post-conviction relief under U.S.C. 28 §  
8 2254 must obtain a COA in order to appeal a district court's dismissal of his petition. *See* 28  
9 U.S.C. § 2253(c)(2). When a federal habeas petition is denied on procedural grounds without  
10 reaching the prisoner's underlying constitutional claim, a prisoner is entitled to a COA when he  
11 shows, at least, "jurists of reason would find it debatable whether the petition states a valid claim  
12 of the denial of a constitutional right and jurists of reason would find it debatable whether the  
13 district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

14 Because jurists of reason would not find it debatable whether Petitioner's claims should be  
15 denied as untimely, the Court agrees with the recommendation of Magistrate Judge Theiler that a  
16 COA should not be issued. Accordingly, issuance of a COA is denied.

## 17 V. CONCLUSION

18 For the foregoing reasons, the Court hereby orders as follows:

19 (1) The Report and Recommendation of Magistrate Judge Mary Alice Theiler is hereby

20 ADOPTED;

21 (2) Petitioner's habeas petition and this action are DISMISSED with prejudice;

22 (3) Petitioner is DENIED issuance of a certificate of appealability, and  
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1 (4) The Clerk is directed to send copies of this Order to Petitioner, to counsel for  
2 Respondent, and to Magistrate Judge Theiler.

3 DATED this 23rd day of June, 2020.

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BARBARA J. ROTHSTEIN  
6 UNITED STATES DISTRICT JUDGE  
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